No. 82-1485

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IN THE

Supreme Court of the United States

October Term, 1982

CHARLES REED

Petitioner

v.

UNITED STATES OF AMERICA

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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QUESTIONS PRESENTED

1. Where the District Court *sua sponte* granted a continuance of a case, giving at the time boilerplate reasons to justify its actions, was a later denial of Petitioner's Pre-Trial Motion to Dismiss under the Speedy Trial Act a violation of the Tenets of that Act and the Sixth Amendment right to a speedy trial?

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Charles Reed, your Petitioner, respectfully prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit, entered in the above entitled case on December 30, 1982.

OPINIONS BELOW

On December 30, 1982 the United States Court of Appeals for the Third Circuit entered a Judgment Order, which has not been officially reported, but is reproduced in Appendix A, *infra*, pages A-A affirming the judgment of conviction and sentence entered by the United States District Court for the Eastern District of Pennsylvania. On February 9, 1982, Judge Bechtle had filed an Order denying Petitioner's Pre-Trial Motion to Dismiss for alleged violation of the Speedy Trial Act and made findings of fact and conclusion of law in a Memorandum Order, which has not been officially reported, but which is reproduced in Appendix C, *infra*, pages A-A. On January 24, 1983 the Third Circuit denied a Petition for Rehearing in Banc which has not been officially reported but is reproduced in Appendix B, *infra*, pages A-A.

JURISDICTION

The Order of the United States Court of Appeals for the Third Circuit (Appendix A, *infra* pages A-A) affirming the judgment of the District Court, was entered on November 15, 1982. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL STATUTES INVOLVED

The United States Constitution provides in pertinent part:

AMENDMENT VI - PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . .

The Speedy Trial Act provides in pertinent part:
18 U.S.C. §3161 TIME LIMITS AND EXCLUSIONS

(c) (1) In any case in which a plea of not guilty is entered, the trial of a defendant charged in an information or indictment which the commission of an offense shall commence within seventy days from the filing date (and making public) of the information or indictment, or from the date the defendant has appeared before a judicial officer of the court in which such charge is pending, whichever date last occurs.

(h) (8) (a)

The following periods of delay shall be excluded in computing the time within which an information of an indictment must be filed, or in computing the time within which the trial of any such offense must commence:

Any period of delay resulting from a continuance granted by any judge on his own motion or at the request of the defendant or his counsel for at the request of the attorney for the Government, if the judge granted such continuance on the basis of his findings that the ends of justice served by taking such action outweigh the best interest of the public and the defendant in a speedy trial. No such period of delay resulting from a continuance granted by the court in accordance with this paragraph shall be excludable under this subsection unless the court sets forth, in the record of the case, either orally or in writing, its reasons for finding that the ends of justice served by the granting of such continuance outweigh the best interests of the public and the defendant in a speedy trial.

STATEMENT OF THE CASE

The Petitioner Charles Reed was indicted as part of a five count indictment returned against nine persons in the Eastern District of Pennsylvania on August 5, 1981. The Petitioner was charged in the first count only, charging conspiracy to distribute methamphetamine in violation of 21 U.S.C. §846.

Prior to trial, guilty pleas were entered by co-Defendants Richard Jones, Leroy Scott, and Raymond McGowan (charged only with conspiracy). Judy Simpson and Lucy Simpson, who were also charged with conspiracy in count one, had their charges dropped by the Government prior to trial.

On August 10, 1981, the Petitioner appeared for his arraignment and entered a plea of not guilty to the one count in which he had been charged. Bond was set in the sum of Ten Thousand Dollars at ten percent, and the Petitioner was released.

On September 8, 1981, trial consel for the Petitioner, Burton A. Rose, Esquire, entered his appearance for the Petitioner. At the same time counsel filed a motion to extend the time for the filing of pre-trial motions.

In that Motion, counsel advised the Court that since the discovery process was not completed as of that time, an extension for reasonable time was sought in order to determine, as a result of that discovery, whether or not any pre-trial motions would be warranted in the case.

Before that Motion could be decided, Judge Bechtle entered on Order on September 10, 1981, directing that excludable time in the above-captioned case would be computed and entered on the record from the date of the filing of the Defendant's motion to extend time for filing pre-trial motions, September 8, 1981, until such time as the motion was disposed of. Such an Order was appropriate pursuant to 18 U.S.C. §3161 (h) (1) (F).

On September 29, 1981, the District Court, acting in response to the Motion of the Petitioner filed on September 8, 1981, entered an Order, granting an additional period of time until October 15, 1981 for the purpose of submitting any pre-trial motions which may develop because of discovery with the United States Government.

On October 1, 1981, the District Court entered another Order, a copy of which is attached hereto in Appendix D, in which it was held that the above action could not proceed to trial and would be continued, and in support thereof checked off certain blocks on a pre-typed form as appeared in the Order. The Order held that the failure to grant a continuance would make a continuation of the proceedings impossible or result in a miscarriage of justice, and that the case taken as a whole was so unusual and complex that it was unreasonable to expect adequate preparation within the periods of time established. The Court concluded that "the ends of justice" served by granting the continuance outweighed the interest of the Defendant and the public in a speedy-trial, and therefore ordered the case continued.

On October 13, 1981, counsel for the Petitioner forwarded a letter to the District Court. That letter advised the Court that no pre-trial motions would be filed on behalf of the Petitioner, but that in the event that subsequent discovery indicated grounds for such motions, defense counsel reserved the right to file such motions at that time.

Subsequent to these events, the case proceeded in a limbo status until January 15, 1982, when the Court sent notice to the various Defendants that a hearing would be held concerning a "possible date for trial and the retention on counsel by the Defendants". At that time, only two (2) of the various Defendants, Leroy Scott and the Petitioner, had retained counsel. This left six (6) Defendants who had been indicted on August 5, 1981 and who had not been called upon to appear in Court with counsel as of January 15, 1982. The hearing for that purpose was scheduled before Judge Bechtle on February 2, 1982.

Prior to that hearing, cousel for Petitioner filed an Application for Dismissal under the Speedy Trial Act with the District Court.

This motion was denied by the District Court by virtue of a Memorandum Order dated February 9, 1982; a copy of which is attached hereto and marked Exhibit "B".

On February 5, 1982, the District Court sent out a notice scheduling the matter for trial on February 16, 1982.

The pre-trial motion referred to above alleged that the seventy-day period permitted by the Speedy Trial Act for a trial subsequent to the post-indictment arraignment would have expired on October 24, 1981. Petitioner concedes that the filing of the pre-trial Motion on September 8, 1981, (seeking additional time to file Pre-trial Motions) caused a period of excludable time which is added to the date aforementioned. Since the District Court disposed of the Pre-trial Motion on October 15, 1981, a period of thirty seven days would be added on so that the trial should have occurred no later than December 1, 1981.

The case proceeded to trial before a jury and the Petitioner was found guilty as to count one on February 25, 1982.

On April 13, 1982, Judge Bechtle sentenced the Petitioner to a term of three years in the custody of the Attorney General. The Petitioner took a timely Appeal to the Third Circuit. That Court affirmed the District Court on December 30, 1982. A Petition for Rehearing In Banc was denied on January 24, 1983.

REASONS FOR GRANTING THE WRIT

I. The District's Court's denial of Petitioner's Pre-Trial Motion Seeking Dismissal Under the Speedy Trial Act 18 U.S.C. 3161 et seq. violated the tenets of that Act and the Sixth Amendment to the United States Constitution.

As has been indicated above, the trial commenced well beyond the seventy day period allowed under the Speedy Trial Act, 18 U.S.C. §3161(c). The failure to dismiss this indictment and the upholding of the decision by the Third Circuit Court of Appeals has raised a novel new issue on a federal question regarding a procedure which has so far departed from the accepted and usual course of judicial proceeding as to call for an exercise of this Court's power of supervision.

The District Court's Order of October 1, 1981 granted a general continuance to serve "the ends of justice" occurred *sua sponte*, without application from either party. The Appellant contended in the Motion to Dismiss that the aforesaid Order was not sufficiently based upon any Findings of Fact appropriate to the case and was unsupported by the record. Additionally, the Petitioner contended that the reasons supplied in that Order were not based upon the circumstances of this particular case, but rather represented general conclusions unwarranted by the circumstances of this litigation. It was noted that no evidentiary hearing or Fact-Finding activity was undertaken by the District Court prior to the entry of the Order of October 1, 1981.

In the argument to the District Court concerning the Motion to Dismiss, the Petitioner cited *United States v. Carrasquillo*, 667 F.2d 382 (3rd Cir. 1981). Appellant argued that the granting of such a continuance under this case must be based upon reasons and findings which clearly establish that the ends of justice allegedly served by the granting of the continuance do in fact outweigh the interest of the Defendant and the public in a Speedy Trial and that such reasons and findings must be made prior to the expiration of the time frame for trial.

Furthermore, the Motion to Dismiss objected to the District Court's use of form language tracking the phrases supplied in the Act in order to justify the continuance. The Petitioner averred in the Motion to Dismiss that there were no reasons to justify the District Court's conclusion that the failure to grant a continuance would make a continuation of the proceedings impossible or result in a miscarriage of justice, or that the case was so unusual or complex that it was unreasonable to expect adequate preparation within the period of time allowed until November 15, 1981.

In *United States v. Carrasquillo, supra,* the Third Circuit stated that "any delay must be justified on the record and only under carefully limited circumstances" and favorably noted the language from the United States Senate Hearings to the effect that the only delays which are permitted are those which are "absolutely necessary to secure a fair trial".

The Petitioner argued before Judge Bechtle that the Order of October 1, 1981 should be set aside and the case dismissed with prejudice, with reprosecution prohibited since the same would have an adverse and negative impact on both the administration of the Act and the administration of justice, since such extensive delays on an insufficient basis should not be tolerated.

In denying this Motion, the District Court stated that this case "is a very complex drug conspiracy involving nine defendants." It must be noted that at the time of that Order, the case had not yet gone to trial and the District Court made this conclusion soley on the basis of the Indictment, as that was the only matter of evidence that the Court had before it that moment. The Court further noted that many of the Defendants were unrepresented; however, this Appellant was represented prior to the time that the Distict Court entered its Order on October 1, 1981 continuing the case because of this alleged complexity. The Appellant submits that his Speedy Trial claim should not be rejected

merely because the co-defendants had not been called upon by the Court to appear and provide reasons why they were not yet represented; the District Court did not take this action until February 2, 1982.

The District Court went on to state that becaue the request for an extension of time to file Pre-trial Motions "was unreasonable", the Court entered the Order of October 1, 1981 granting "an ends of justice" continuance. The Court went on to misconstrue the letter of defense counsel dated October 13, 1981 as a request to postpone the time for filing of Pre-trial Motions for an indefinite period. As is indicated by a fair review of that letter, the only purpose thereof was to notify the District Court that an opportunity had not yet been provided to listen to the various tape recordings in the case since the Government wished to make a single presentation to all counsel of those tapes, and other defendants had not yet retained their attorneys. It cannot be fairly said that the letter constitutes an argument that the case was too complex to prepare for trial before November 15, 1981. The fact that *no* Pre-trial Motions were in fact filed -- is certainly not evidence of the complexity of the case and indeed shows the lack of complexity.

At no time did counsel for Petitioner request that the District Court delay the trial date or take any other action with regard to the scheduling of the trial based upon the complexity of the case.

The Petitioner disagrees with the conclusion of the Court that the time required to prepare the case was "totally within the control of the Defendant and his counsel and counsel for the Government". Although the issue of discovery was certainly a matter of counsel to resolve, the Petitioner contends that it was the responsibility of the District Court to take stock of the Speedy Trial Act's limitations and assure itself that the scheduling of the case

for trial would be consistent with those restrictions. *United States v. New Buffalo Amusement Corp.*, 600 F.2d 368, 375-76 (2d Cir. 1979). The Order of October 1, 1981, was entered at a time when the District Court had no basis -- and made no factual findings in support thereof -- to conclude that the case was so complex that trial could not be had within the time then remaining.

As stated in *United States v. Molt*, 631 F.2d 258 (3rd Cir. 1980) the intent of Congress in requiring reasons to be stated in the record by the Court in granting an "ends of justice" continuance is to allow for proper Appellate review. In this case, unlike *Molt* an appellate court cannon determine whether or not Judge Bechtle was correct since his Order of October 1, 1981 merely tracked the form language of the Act and involved merely checking blocks on a form while providing no findings or reasons in support thereof. Of the two "boilerplate" reasons for allowing an "end of justice" continuance the first included the general statement: "[t]he failure to grant such a continuance . . . would be likely to make a continuation of such proceeding impossible, or result in a miscarriage of justice." This language leads to highly subjective reasoning based on extremely broad guidelines which supplies an appellate court with little or no indication of the factual basis which prompted the District Judge to grant the continuance.

The second reason checked state that: "[t]he case taken as a whole is so unusual and so complex; due to the number of defendants or the nature of the prosecution and other complexity, that it is unreasonable to expect adequate preparation within the periods of time established." Although this reason is more helpful to a reviewing court than the first, this second reason is a compound factual statement not all of which may be relevant to the District Court's decision and, as such, was insufficient to provide clear enough explication of the District Court's reasoning to enable an appellate court to properly review the decision to grant a continuance.

The Memorandum Order of February 9, 1982, denying the Motion for a Speedy Trial Act dismissal does not comply with the requirements for finding and reasons as contained in *Carrasquillo* and *Molt, supra,* or under 18 U.S.C §3161(h) (8) (A).

In *United States v. Nance,* 666 F.2d 353 (9th Cir. 1982), it was stated that granting an "ends of justice" continuance is a tactic which the District Courts should "rarely use". This conclusion was based upon an analysis of the legislative history involved. The Ninth Circuit went on to say that the "interest of justice exception should not be invoked without findings to support it", 666 F.2d at 356.

The Ninth Circuit further stated that a trial Judge has a responsibility to protect the Speedy Trial rights of the accused and therefore "must keep track" of the time limits contained in the Act in scheduling the various cases before it for trials.

In *United States v. Fielding.* 645 F.2d 719 (9th Cir. 1981), that same court stated that a trial Judge is required to make factual findings in considering the factors involved in a continuance under the Act and must "explicitly set forth his reasons for finding that the ends of justice served by the continuance outweigh other interests protected by the Act." 645 F.2d at 722.

The Appellant respectfully submits that in this case the District Judge failed to comply with these standards and failed to conduct the "searching inquiry", *United States v. Fielding, supra,* required by the Act before "an ends of justice" continuance can be granted. An examination of the record of this case indicates that at the time the continuance was made, the District Court had before it only the indictment and the material supplied by defense counsel, which could not serve as a sufficient basis to conclude that the case was so complex that could not be tried within the time frame supplied by the Act. Even if one looks to subsequent facts, the case was not possessed of any unusual

complexity. Only four (4) of the nine (9) Defendants actually went to trial, at which time the Government only called seven (7) witnesses, two (2) of whom were chemists. The case was over in a period of five (5) days. As to the Appellant Charles Reed, the only witness who testified as to his alleged criminal activities in this case was one Robert Barron. Additionally, it should be noted that when the four Court-appointed Attorneys appeared in Court on February 2, 1982, having just received their appointments, they objected to the trial date of February 16, 1982, but such protests were refused and continuances were denied. At that point apparently, the District Court did not believe that the case was so complex that trial could not be held within a two (2) week period even though trial counsel for many of the Defendants had just been assigned to the litigation.

In the Third Circuit's opinion it stated that the Act does not require a contemporaneous recording of reasons for the District Court's *sua sponte* granting of a continuance. Slip Op. at 10. The Court stated its agreement with the District of Columbia and Eighth Circuits. *United States v. Edwards,* 627 F.2d 460, 461 (D.C.Cir.), *cert. denied,* 449 U.S. 872 (1980); *United States v. Clifford,* 664 F.2d 1090, 1095 (8th Cir. 1981). However, Judge Bechtle did not give any substantial reasons till February 9, 1982, a period of time 191 days after the arraignment and well beyond the seventy day period of §3161(h) (8) (A). *Carrasquillo* stands for the proposition continuances are not to be granted *nunc pro tunc.* See also *United States v. La Cruz,* 441 F. Supp. 1261, 1264-65 (S.D. N.Y. 1977).

In the instant case, the District Court did not comply with the requirement of placing reasons for granting the continuance on the record and even if this was done the reasons were factually insufficient to justify the continuance that was granted. However, the Third Circuit affirmed this opinion. This Court must invoke its supervisory powers to delineate the accepted and ususal course of proceedings of the relevant portions of the Speedy Trial Act presented herein.

CONCLUSION

For all of the foregoing reasons, this Petition for Writ of Certiorari should be granted.

Respectfully Submitted,

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